



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 5, 1996

Ms. Abigail C. Klamert
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR96-0883

Dear Ms. Klamert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39989.

The Department of Agriculture (the "department") received an open records request for information related to investigations by the department relating to pesticide or chemical misapplication within Lubbock County. You state that one investigation at issue is currently being reviewed by the department's legal staff to determine if a violation of the Texas Agriculture Code occurred and if administrative penalties should be assessed. You state that if the department's legal staff determines that a violation occurred, then the department fully intends to prosecute the case. You contend that certain requested information is excepted from required public disclosure by sections 552.101 and 552.103(a) of the Government Code. You have submitted for our review documents responsive to the investigation at issue.¹

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. For purposes of section 552.103(a), this office considers a contested case under the

¹It is our understanding that documents related to one active file are at issue. We note that the requestor also seeks "the status or findings of any other active or resolved cases of alleged chemical application within Lubbock County during the past two years." We assume this information has been supplied to the requestor or that the active case at issue represents the only responsive records.

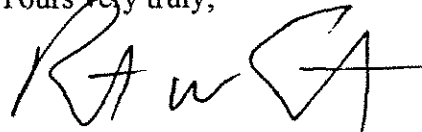
Administrative Procedure Act, chapter 2001 of the Government Code, to be litigation. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

The department is authorized to investigate pesticide related complaints and may assess penalties for violations of chapter 76 of the Agriculture Code pursuant to section 76.1555. In this instance, the department has supplied this office with information indicating that an investigation is pending and that, if appropriate, the department will take enforcement action as authorized by statute. Thus, we conclude that litigation is reasonably anticipated. We further find that the documents that have been submitted are related to reasonably anticipated litigation for the purposes of section 552.103(a).²

Our review of the submitted records indicates that some of the information at issue has already been seen by the opposing party in the anticipated litigation. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any non-confidential information that has previously been viewed by the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). We also note that the applicability of this section ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982) (concerning pesticide complaint investigation files); Open Records Decision No. 350 (1982) at 3.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS', with a stylized flourish at the end.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

²Because we find that you may withhold the requested information under section 552.103, we do not determine whether specific information may be withheld under section 552.101. We note, however, that included among the documents that you submitted to this office for review are certain medical records. These medical records are governed by the Medical Practice Act ("MPA"), V.T.C.S. article 4495b and may only be released in accordance with the MPA.

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RWS/rho

Ref.: ID# 39989

Enclosures: Submitted documents

cc: Mr. Burle Pettit
Lubbock Avalanche-Journal
P.O. Box 491
Lubbock, Texas 79408
(w/o enclosures)